

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

\* \* \*

HSBC Bank USA, National Association,  
Plaintiff,

v.

Stewart Information Services Corporation, et  
al.,  
Defendants.

Case No. 2:21-cv-00637-RFB-BNW

**Order**

**I. Introduction**

Pending before the Court is Plaintiff HSBC's motion to compel. ECF No. 67. Defendant Stewart opposed the motion (ECF No. 69), and Plaintiff replied (ECF No. 70). HSBC seeks to compel Stewart's Senior Vice President and Chief Underwriting Counsel (Mr. Gosdin) to answer certain questions posed at his deposition about conversations he had with Stewart's counsel and non-party Fidelity's counsel. Stewart objected to Mr. Gosdin answering these questions on the basis that they were protected by the common interest privilege. HSBC also requested Stewart and Fidelity's Common Interest Agreement, which Stewart asserted is privileged and declined to provide. For the reasons discussed below, the Court denies HSBC's motion to compel.

**II. Background**

This is one of the many HOA/lender/title insurance cases in this district. This case, like the other HOA/lender/title insurance cases, stems from allegations that in the 2000s, lenders were insured by title insurers through certain form policies for deeds of trusts. Homeowners' Associations (HOAs) foreclosed on certain properties. Quiet title actions were then brought to determine whether the lenders' deeds of trust survived the foreclosure sales. Lenders also made claims to their insurers. The insurers, in turn, determined that the lenders' claims were not covered by the form policies (or were otherwise excluded from coverage).

Here, in short, HSBC had a title insurance policy through Stewart for a particular property. When an HOA foreclosed on the property, the purchaser of the property asserted that its

1 interest was superior to HSBC's. This resulted in litigation between the HOA and HSBC. HSBC  
2 also made a claim to Stewart under its policies for Stewart to defend and indemnify it. Stewart  
3 largely denied HSBC's claim, and this suit followed. At bottom, the parties disagree about how  
4 Stewart's form policies should be interpreted and what they cover.

5 HSBC contends that the policies should be interpreted to provide coverage and,  
6 importantly, that when one looks at how the form policies are discussed in the trade, it becomes  
7 clear that Stewart's policies provide coverage in this situation. In fact, HSBC contends that  
8 Stewart's own Senior Vice President and Chief Underwriting Counsel, Mr. Gosdin, authored a  
9 publication that makes this clear. Specifically, Mr. Gosdin authored a publication for the  
10 American Bar Association called, "Title Insurance, A Comprehensive Overview." This  
11 publication discusses the form policies at issue in this case and, according to HSBC, confirms that  
12 Stewart's policies provide coverage here.

13 Accordingly, HSBC deposed Mr. Gosdin in this case. Mr. Gosdin disclosed that in  
14 preparing for his deposition, he had several discussions with Stewart's counsel and non-party  
15 title-insurer Fidelity's counsel. Stewart objected, however, to Mr. Gosdin answering any  
16 questions about the content of those discussions, asserting that the common interest privilege  
17 protected those communications. Stewart also stated that it entered into a Common Interest  
18 Agreement with Fidelity, which it asserted was protected by the attorney-client privilege and  
19 work product doctrine. HSBC disagreed on both fronts and now seeks to compel Mr. Gosdin to  
20 disclose the contents of his communications with Stewart and Fidelity's counsel, as well as the  
21 Common Interest Agreement.

### 22 **III. Analysis**

23 There are two issues presented by HSBC's motion to compel: (1) whether the Common  
24 Interest Agreement should be produced and (2) whether Mr. Gosdin's communications with  
25 Stewart and Fidelity's counsel are protected by the common interest privilege.  
26  
27  
28

**A. The Common Interest Agreement**

On the record before it, the Court declines to decide whether the Common Interest Agreement is privileged. It does not appear that HSBC properly requested this document under the Federal Rules of Civil Procedure or that Stewart has had the opportunity to respond to a proper request under the Rules. It also appears that Stewart has not produced a privilege log (because the document has not been properly requested). And the parties have not briefed the issue of whether the document is privileged based on the appropriate authority (including whose burden it is to establish that the document is privileged and when that burden shifts based on a privilege log).

Accordingly, HSBC may properly seek this document under the Federal Rules of Civil Procedure. Stewart will have 14 days to respond and produce a privilege log, if appropriate. If, after Stewart responds, the parties continue to dispute whether the document is privileged, they must meet and confer. If they still cannot reach a resolution, HSBC may file an appropriate motion and must discuss whose burden it is to show that the document is privileged.

**B. The Common Interest Privilege**

The parties agree that Nevada law governs whether the common interest privilege applies. ECF No. 67 at 6, n. 1; ECF No. 69 at 7, 10. The common interest privilege is an extension of the attorney-client privilege, which is codified at NRS § 49.095. NRS § 49.095 provides:

A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications:

1. Between the client or the client's representative and the client's lawyer or the representative of the client's lawyer.
2. Between the client's lawyer and the lawyer's representative.
3. Made for the purpose of facilitating the rendition of professional legal services to the client, by the client or the client's lawyer to a lawyer representing another in a matter of common interest.

Nev. Rev. Stat. Ann. § 49.095 (West).

In other words, for the attorney-client "privilege to apply, the communications must be between an attorney and client, for the purpose of facilitating the rendition of professional legal

1 services, and be confidential.” *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*,  
 2 133 Nev. 369, 374 (2017). The common interest privilege protects communications made to  
 3 facilitate the rendition of professional legal services to the client when the communications are  
 4 made by the client or the client’s lawyer to another lawyer representing a different client in a  
 5 matter of common interest. NRS § 49.095.

6 In determining whether the common interest privilege applies, the Court must engage in a  
 7 two-step analysis. First, the court must decide whether the information would otherwise be  
 8 protected by a privilege (e.g., the attorney-client privilege) but for disclosure to a third party. *See*  
 9 *Cotter v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 134 Nev. 247, 250-51 (2018). Second, the  
 10 court must decide whether disclosing the information to the third party waived the privilege. *See*  
 11 *id.*

12 Here, the parties dispute (1) whether Mr. Gosdin’s communications with Stewart’s  
 13 counsel are protected by the attorney-client privilege and, (2) if they are, whether the  
 14 communications with Fidelity’s counsel waived the attorney-client privilege (or are protected by  
 15 the common interest privilege). The Court will address each issue in turn.

16 **i. Whether Mr. Gosdin’s Communications With Stewart’s Counsel Are**  
 17 **Protected By the Attorney-Client Privilege**

18 Mr. Gosdin’s communications with Stewart’s counsel to prepare for his deposition are  
 19 protected by the attorney-client privilege. The Nevada Supreme Court adopted the attorney-client  
 20 privilege test announced in *Upjohn* to determine which employees fall within the attorney-client  
 21 privilege when the client is a corporation. *Wardleigh v. Second Jud. Dist. Ct. in & for Cnty. of*  
 22 *Washoe*, 111 Nev. 345, 352 (1995) (“we approve the test announced in *Upjohn*”). In *Upjohn*, the  
 23 United States Supreme Court ruled that in the corporate context, the attorney-client privilege  
 24 applies to communications between corporate employees and corporate counsel for the purpose of  
 25 counsel being able to provide legal advice to the corporation. *Upjohn Co. v. United States*, 449  
 26 U.S. 383, 394 (1981); *see also United States v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996) (“The  
 27 attorney-client privilege applies to communications between corporate employees and counsel,  
 28

1 made at the direction of corporate superiors in order to secure legal advice.”) (citing *Upjohn*, 449  
2 U.S. at 390-94).

3 Here, Mr. Gosdin satisfies the *Upjohn* test. Mr. Gosdin is a corporate employee of  
4 Stewart, as its Senior Vice President and Chief Underwriting Counsel. ECF No. 67 at 2; ECF No.  
5 69 at 2. During the communications at issue, he was speaking with Stewart’s counsel. ECF No.  
6 67 at 2, 5. The purpose of these communications was to prepare Mr. Gosdin to testify accurately  
7 and in a manner that minimizes (what Stewart perceives to be) HSBC’s misrepresentation of his  
8 publications and opinions.<sup>1</sup> ECF No. 69 at 8, n. 4. These communications were undoubtedly for  
9 the purpose of providing legal advice to Stewart. Accordingly, under *Upjohn*, Mr. Gosdin’s  
10 communications with Stewart’s counsel to prepare for his deposition are protected by the  
11 attorney-client privilege.

12 Contrary to HSBC’s assertion, Nevada does not apply the managing-speaking agent test to  
13 corporations to determine what communications are attorney-client privileged. ECF No. 67 at 8-9.  
14 As previously noted, the Nevada Supreme Court adopted the *Upjohn* test for purposes of  
15 determining who is subject to the attorney-client privilege in the corporate context. *Wardleigh*,  
16 111 Nev. at 352 (“we approve the test announced in *Upjohn*”).

17 HSBC incorrectly relies on *Palmer v. Pioneer Inn Assocs., Ltd.*, 118 Nev. 943 (2002) for  
18 the proposition that the Nevada Supreme Court subsequently adopted the managing-speaking  
19 agent test to determine who is a “client” for purposes of the attorney-client privilege in the  
20 corporate context. ECF No. 67 at 8-9; ECF No. 70 at 4. *Palmer* explicitly answered a different  
21 question: “What test does Nevada use in applying Supreme Court Rule 182 [the no-contact rule]  
22 to an employee of a represented organization?” 118 Nev. at 945. The Nevada Supreme Court  
23 concluded that Nevada uses the managing-speaking agent test to determine which employees  
24 opposing counsel may contact at a corporation represented by counsel. *Id.* at 960 (“We conclude  
25 that the managing-speaking agent test . . . best balances the policies at stake when considering  
26 what contact with an organization’s representatives is appropriate.”). As such, *Palmer* explicitly  
27 decided what test Nevada uses to determine who counsel can contact at a represented corporation

28 <sup>1</sup> The Court expresses no opinion on HSBC’s interpretations of Mr. Gosdin’s opinions and publications.

1 without violating the no-contact rule; it did not decide which employees fall within the attorney-  
 2 client privilege at a corporation.

3 Indeed, throughout its decision in *Palmer*, the Nevada Supreme Court made it clear that  
 4 the test for the no-contact rule is different from the test for the attorney-client privilege. In  
 5 explaining its decision, the court noted that a corporate employee may not be a “party” under the  
 6 managing-speaking agent test but nonetheless have his communications with corporate counsel  
 7 protected by the attorney-client privilege. *Id.* at 961 (“[A]n employee for whom counsel has not  
 8 been retained does not become a ‘represented party’ simply because his or her conduct may be  
 9 imputed to the organization; while any confidential communications between such an employee  
 10 and the organization’s counsel would be protected by the attorney-client privilege . . .”). To put  
 11 an even finer point on it, the Nevada Supreme Court stated that the managing-speaking agent test  
 12 should be interpreted as set forth in *Wright by Wright v. Grp. Health Hosp.*, 103 Wash. 2d 192  
 13 (1984). *Palmer*, 118 Nev. at 960. *Wright by Wright* similarly explained that because different  
 14 policies animate the attorney-client privilege and the no-contact rule, “[a] corporate employee  
 15 who is a ‘client’ under the attorney-client privilege is not necessarily a ‘party’ for purposes of the  
 16 disciplinary rule.” 103 Wash. 2d at 202. Accordingly, the Nevada Supreme Court only adopted  
 17 the managing-speaking agent test to determine who is a party for purposes of the no-contact rule;  
 18 it did not adopt the managing-speaking agent test for purposes of the attorney-client privilege.

19 **ii. Whether the Communications with Fidelity’s Counsel are Protected**  
 20 **By the Common Interest Privilege**

21 The parties agree that the Nevada Supreme Court has not squarely addressed the  
 22 requirements of the common interest privilege as codified at NRS § 49.095. ECF No. 67 at 6;  
 23 ECF No. 69 at 7. “Where the state’s highest court has not decided an issue, the task of the federal  
 24 courts is to predict how the state high court would resolve it.” *Giles v. Gen. Motors Acceptance*  
 25 *Corp.*, 494 F.3d 865, 872 (9th Cir. 2007). Accordingly, this Court must predict how the Nevada  
 26 Supreme Court would address whether Mr. Gosdin’s communications with Stewart and Fidelity’s  
 27 counsel are protected by the common interest privilege. One Nevada Supreme Court decision,  
 28

1 *Cotter v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, provides significant guidance. 134 Nev.  
2 247 (2018).

3 In *Cotter*, the Court adopted the common interest privilege as it applies to the work-  
4 product doctrine (as opposed to the attorney-client privilege). *Id.* at 250-251. The Nevada  
5 Supreme Court provided that:

6 [f]or the common interest rule to apply, the transferor and transferee [must]  
7 anticipate litigation against a common adversary on the same issue or issues and  
8 have strong common interests in sharing the fruit of the trial preparation efforts.  
9 The rule is not narrowly limited to co-parties. In addition, a written agreement is  
10 not required, and common interest may be implied from conduct and situation, such  
as attorneys exchanging confidential communications from clients who are or  
potentially may be codefendants or have common interests in litigation.

11 *Id.* at 250 (cleaned up). In other words, for the common interest privilege to apply to work  
12 product, (1) the communicating parties must anticipate litigation (2) against a common adversary  
13 (3) on the same issue or issues and (4) have a strong common interest in sharing their work  
14 product. *Id.*

15 This Court sees no reason why the Nevada Supreme Court would treat the common  
16 interest privilege differently in the context of the attorney-client privilege. The purpose of the  
17 common interest privilege is to allow persons who share a common interest in litigation “to  
18 communicate with their respective attorneys and with each other to more effectively prosecute or  
19 defend their claims.” *United States v. Gonzalez*, 669 F.3d 974, 978 (9th Cir. 2012) (cited by  
20 *Cotter* 134 Nev. at 250). Accordingly, it makes sense that the same test would apply to determine  
21 if counsel can share work product or attorney-client communications with someone who shares a  
22 common interest without waiving these privileges. Put another way, it makes little sense that  
23 counsel could share work product under the test outlined above to effectively litigate their claims  
24 but could not discuss privileged communications for the same purpose. Accordingly, the Court  
25 predicts that if the Nevada Supreme Court were to take up this issue, it would apply the test  
26 announced in *Cotter* to the common interest privilege in the context of attorney-client privilege.

27 Here, Mr. Gosdin’s communications with Stewart’s counsel and Fidelity’s counsel are  
28 protected by the common interest privilege.

1           Regarding the first and second elements (anticipating litigation against a common  
2 adversary), the communicating parties (Stewart and Fidelity) anticipate (and are actually engaged  
3 in) litigation against a common adversary, HSBC. *See, e.g., HSBC Bank USA National*  
4 *Association v. Fidelity National Title Group, Inc. et al.*, No. 2:18-cv-02162-MMD-DJA.

5           Regarding the third element (the litigation involves the same issue), these cases both  
6 involve how the form policies at issue in this litigation are discussed in the trade, which  
7 according to HSBC, confirms that the policies provide coverage to lenders for losses caused by  
8 enforcement of associations' superpriority liens. *Id.* at ECF No. 62 at 2; ECF No. 1-1 at 3.  
9 Furthermore, the complaints in both cases specifically discuss Mr. Gosdin's publications and  
10 allege that he "confirmed that ALTA 9 was intended to insure 'the priority of the lien of the  
11 Insured Mortgage over future assessments by property owner's associations.'" ECF No. 1-1 at 6;  
12 *see also HSBC Bank USA National Association v. Fidelity National Title Group, Inc. et al.*, No.  
13 2:18-cv-02162-MMD-DJA, ECF No. 62 at 5 ("As Mr. Gosdin has explained, the ALTA 9 and its  
14 CLTA 100.2 counterpart 'insure priority of the lien of the Insured Mortgage over future  
15 assessments by property owner's associations.'").

16           Regarding the fourth and final issue (having a strong common interest in sharing the  
17 privileged information), both Stewart and Fidelity have a strong common interest in preparing  
18 Mr. Gosdin to testify accurately and in a manner that minimizes (what they perceive to be)  
19 HSBC's misrepresentation of his publications and opinions. *See* ECF No. 69 at 8, n.4. This is so  
20 because HSBC indicated that it intends to use Mr. Gosdin's publications and opinions about the  
21 trade against Stewart and Fidelity in the same manner. HSBC made the same allegations against  
22 both insurers in its complaints (that Mr. Gosdin's publications confirm that ALTA 9 was  
23 intended to insure the priority of lenders' liens). ECF No. 1-1 at 6; *see also HSBC Bank USA*  
24 *National Association v. Fidelity National Title Group, Inc. et al.*, No. 2:18-cv-02162-MMD-  
25 DJA, ECF No. 62 at 5. As a result, Stewart and Fidelity entered the Common Interest  
26 Agreement, memorializing their common legal interest and confirming that communications  
27 between the parties and their counsel related to Mr. Gosdin's deposition would be privileged.  
28 ECF No. 69 at 7. And HSBC deposed Mr. Gosdin, not because he was specifically involved in




1 this case,<sup>2</sup> but to understand his knowledge of how the form policies are interpreted in the trade.  
2 HSBC's counsel told him at his deposition, "Generally, when I ask you questions today, I'm  
3 going to be asking for your understanding of title insurance industry custom and trade usage.  
4 That's always going to be true unless I say otherwise." ECF No. 67-2 at 13:21-24. Accordingly,  
5 Stewart and Fidelity had a strong common interest in preparing Mr. Gosdin for his deposition.<sup>3</sup>

6 **IV. Conclusion**

7 **IT IS THEREFORE ORDERED** that HSBC's motion to compel (ECF No. 67) is  
8 DENIED.

9 DATED: February 13, 2023

10   
11 BRENDA WEKSLER  
12 UNITED STATES MAGISTRATE JUDGE  
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24 <sup>2</sup> Mr. Gosdin was not involved in denying HSBC's underlying claim. ECF No. 69 at 6.

25 <sup>3</sup> The Court declines to reach HSBC's argument that Stewart's position is an at-issue waiver, as this argument was  
26 raised for the first time in its reply. *See* ECF No. 67; ECF No. 70 at 4. However, were the Court to reach this  
27 argument, it would not find an at-issue waiver on the briefing before it. "[A]t-issue waiver occurs when the holder of  
28 the privilege pleads a claim or defense in such a way that eventually he or she will be forced to draw upon the  
privileged communication at trial in order to prevail . . . ." *Wardleigh v. Second Jud. Dist. Ct. in & for Cnty. of Washoe*, 111 Nev. 345, 355 (1995). HSBC argues that there is an at-issue waiver because Stewart asserted in  
discovery that Mr. Gosdin does not speak on its behalf. ECF No. 70 at 4. This argument does not satisfy Nevada's  
test.